OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include management's liability for sexual harassment, retaliatory responses to sexual harassment claims, "opposition" activity as a basis for a retaliation claim, racial harassment, and constructive discharge.

Also presented in this issue are some questions and answers concerning EEOC's new Federal sector complaint processing regulation.

The *OEDCA Digest* is available on the World Wide Web at: www.va.gov/orm, and on the Intranet at: *vaww.gov/orm/oedca/digest*.

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I

FAILURE TO TAKE PROMPT AND EFFECTIVE CORRECTIVE ACTION RESULTS IN FINDING OF LIABILITY IN SEXUAL HARASSMENT CASE

The complainant, a program assistant in the Nutrition and Food Service, alleged that a food service worker in the kitchen had repeatedly subjected her to unwelcome sexual advances between 1991 and 1997. The conduct included frequent lewd remarks (some whispered in her ear), and suggestions and comments that she and the co-worker go out together. The complainant states that she repeatedly rebuffed his advances, saying things like, "leave me alone", "I'm not interested in you", "get out of my face", and other unambiguous rejections.

Although the harasser denied all of the complainant's allegations, other witnesses testified that he frequently engaged in this type of conduct and that the female employees did not welcome it. Witnesses also testified that, on several occasions, they saw and heard the complainant warn the harasser to leave her [the complainant] alone. One witness stated that he saw the complainant and the harasser "fussing" every other day for about a year, and that she was constantly telling the harasser to "leave her alone."

The complainant further stated that after telling a supervisor about these incidents, they stopped for a few weeks, but then started up again. During one of the subsequent incidents, the harasser stepped in front of her and brushed his chest against her breasts. Her supervisor, who was present when the incident occurred, claimed that he did not see any touching, but admitted that the two individuals were standing face-to-face in close proximity and arguing. His solution to the problem was to tell the complainant to limit her time in the kitchen where the incidents were occurring, and to return to her office as soon as she had obtained whatever information she needed.

The supervisor also admitted that he was aware of prior incidents of unwelcome sexual behavior by the harasser directed against other women, including hugging, kissing, and touching.

An administrative board, which was convened shortly after this incident, recommended that the harasser receive sexual harassment and sensitivity training, but no discipline.

Several months later, in an angry confrontation with the harasser, the complainant alleged that she was subjected to obscene language and referred to as a "dyke." She reported the incident to the service chief, who then moved the harasser to the night shift. No disciplinary action was taken against the harasser at that time because the evidence concerning the incident was determined to be inconclusive. However, inexplicably, almost a year later, the harasser was suspended for the touching incident that had occurred some seventeen months earlier. In the suspension notice, management acknowledged that the touching had occurred as alleged.

If sexual harassment occurs, management may avoid liability for the harassment if it can show that it took <u>prompt</u>,

appropriate, and effective action to end the harassment and prevent it from recurring. In this case, OEDCA found that management was liable for the harassment because, although it eventually took action against the harasser, the action was not prompt, and its initial reaction to the complainant's harassment claims was not effective. Effective action designed to stop the harassment should have been taken as soon as it became clear that the harasser was continuing his behavior after being warned by his supervisor.

II

EEOC ADMINISTRATIVE JUDGE REFUSES TO FIND DISCRIMINATION WHERE COMPLAINANT FAILED TO SUBMIT SUPPLEMENTAL QUALIFICATIONS STATEMENT ALONG WITH HER APPLICATION FOR PROMOTION

The complainant applied for a position as a patient representative, but did not rank high enough among the applicants to be referred to the selecting official for consideration. She thereafter claimed that the low score she received during the rating and ranking process was due to her race and national origin (Black, Hispanic).

According to the Human Resources specialist who staffed the selection action, the complainant was fully qualified for the position. However, she only received a score of 10 from the rating panel, considerably lower than the cut-off scores of 17 and 18 for the different grade levels at which the position was advertised. The specialist noted that the complainant's low score was primarily due to her failure to submit a Supplemental Qualifications Statement (SQS) with her application. The purpose of the SQS is to provide panel members and selecting officials with relevant information about an applicant's experience and other qualifications as they relate to the advertised position.

The complainant admits that she failed to submit an SQS with her application. She claims, however, that the panel members could have determined her current duties and experience by simply referring to her Official Personnel Folder (OPF). The HR specialist, however, noted that the complainant's OPF did not contain a description of her job duties. Instead, it only contained the name of her position and her original application for employment. While employees are permitted to update their OPFs, the complainant did not do so. Moreover, her failure to submit the SQS along with her application resulted in the rating panel having very little information before them regarding her qualifications.

The complainant also alleged that her low score was due, in part, to a performance appraisal contained in her OPF, which she believed to be unfair. The EEOC administrative judge, however, correctly noted that whether the performance appraisal was discriminatory was not an accepted issue in the complaint. In other words, if the complainant believed that the appraisal was due to discrimination, she could and should have, at the time she received it, filed a complaint about it. As she did not do so, the appraisal was properly included in her OPF and thus properly considered by the panel.

The complainant presented no evidence that the rating panel members considered her race or national origin during the rating and ranking process. In essence, she offered nothing but her own opinion in support of her allegation. She therefore failed to sustain her burden of proving by a preponderance of the evidence that her failure to be referred to the selecting official was due to her race or national origin.

III

INVOLUNTARY REASSIGNMENT OF EMPLOYEE BECAUSE OF ALLEGATIONS OF SEXUAL HARASSMENT RESULTS IN FINDING OF REPRISAL

The complainant contacted an EEO counselor to complain about alleged sexual harassment by her service chief. The counselor, in turn, immediately informed higher level officials within the relevant organization of the allegations. Those officials, in what appears to have been a good faith attempt to take immediate action to protect the complainant, involuntarily detailed her away from her position to remove her from the alleged harasser. The formal EEO complaint she eventually filed took several years to process, during which time she remained on this "detail".

Although the preponderance of the evidence did not support her claim of sexual harassment, management officials nevertheless acted inappropriately by reassigning her without her consent. Not only was the response inappropriate, OEDCA found that it constituted retaliation because the complainant was, in essence, punished for complaining about sexual harassment.

IV

EEOC FINDS NO DISCRIMINATION IN CASE INVOLVING ONE ISOLATED INSTANCE OF A RACIALLY INSENSITIVE REMARK

OEDCA recently adopted an EEOC administrative judge's recommended decision finding no discrimination or harassment because of an isolated incident involving a racially insensitive remark made by a physician who was not the complainant's supervisor.

The complainant, an African-American female, alleged that a part-time physician approached a clerk and a nurse and asked where "the girls" were. Later, while assisting a patient, the physician approached the complainant and said, "hey girlie, can you do…..?" The complainant informed the physician that she found the words "Girls" and "girlie" offensive. She later complained to her supervisor who arranged to have the physician apologize to the complainant. The physician made no further remarks of that nature after the apology.

As noted by the EEOC administrative judge, comments that are offensive to members of a particular group must be examined in light of the totality of the circumstances to determine whether they constitute prohibited discrimination or harassment. The mere use, for example, of an epithet with racial connotations does not, by itself, amount to discrimination or rise to the level of racial harassment. To constitute harassment, the conduct complained of must be per-

sistent, pervasive, or otherwise involve an egregious incident. Sporadic or isolated incidents are generally not sufficient to create a hostile environment. In this case, management took prompt, appropriate, and effective action as soon as it became aware of the matter, thus ensuring that a hostile environment did not develop.

V

DIRECT EVIDENCE OF RETALIATION FOUND WHERE EMPLOYEE WAS DISCIPLINED FOR CALLING HIS SUPERVISOR A RACIST AND THREATENING TO FILE AN EEO COMPLAINT

An employee resigned after receiving a notice of proposed removal. As grounds for the removal action, management accused the complainant in the removal notice of, among other things, claiming that his supervisor had made racist statements and threatening to file an EEO complaint.

An adverse action based in whole or in part on an employee's assertion of rights protected under EEO law and regulations constitutes prohibited retaliation. This is true even if, as in this case, the employee does not actually "participate" in any EEO complaint activity. Here, the complainant engaged in protected activity by virtue of his "opposition" to discriminatory practices -- said opposition being his accusation that his supervisor made racist statements and his threat to file an EEO complaint. Because he was subjected to an adverse action due to his opposition activity, and because such activity is protected under EEO law, OEDCA found that management had engaged in unlawful retaliation.

Other examples of "opposition" activity protected by law include, but are not limited to, accusations of employment discrimination made in letters to newspapers, Congress, or anyone else; grievances or whistleblowing claims that include allegations of employment discrimination; organizing or participating in groups which have, as their purpose, opposition to unlawful discrimination; and participating in marches or protests concerning employment discrimination. Protection, however, extends only to activities that are not destructive of legitimate business interests or do not otherwise jeopardize a stable and productive work environment.

VI

EEOC FINDS THAT BUDGET REDUCTIONS, AND NOT THE COMPLAINANT'S AGE, CAUSED HER TO RECEIVE A TERMINATION NOTICE

The complainant, a staff nurse, was one of nineteen nurses who were notified that they would be terminated from their part-time permanent positions due to budget reductions. Seven nurses with the same employment status (*i.e.,* part-time permanent) were retained. The complainant opted to retire with an immediate annuity in lieu of termination.

She thereafter filed an EEO complaint alleging that her age (64 at the time) was the reason why she was not one of the seven nurses selected for retention. An EEOC administrative judge disagreed, however, and issued a recommended decision finding no age dis-

crimination. OEDCA agreed with the judge's recommendation and adopted it as the Department's final agency decision.

According to management officials, budget reductions imposed by VA Central Office were severe, and the medical region (the "VISN") that had jurisdiction over the facility was projected to have the worst deficit and the worst nurse-to-patient ratio in the nation. The facility's Executive Resource Management Committee determined that staff nurse reductions were necessary. It recommended that part-time nurses be terminated, except for those with a veterans preference, those who were scholarship recipients, and those assigned to specialized areas who were needed to maintain continuity of care.

As noted by the EEOC judge, the complainant was unable to establish even a *prima facie* case of age discrimination because she was unable to show that there were any similarly situated employees who were significantly younger and who were treated more favorably during the staff reductions.

However, even it were assumed for the sake of argument that the complainant had established a *prima facie* case, the EEOC administrative judge correctly concluded that management officials articulated legitimate, nondiscriminatory reasons for the staff reduction, and that the complainant offered no evidence whatsoever that those reasons were a pretext for age discrimination. Absent such evidence, the complainant was unable to prove that she received a termination notice because of her age.

VII

NO CONSTRUCTIVE DISCHARGE FOUND WHERE CHANGE IN PHYSICIAN'S DUTIES DID NOT RENDER HIS WORKING CONDITIONS SO INTOLERABLE AS TO COMPEL HIS RESIGNATION

The complainant, who was board certified in both internal medicine and cardiology, relocated to accept a position at a VA medical center as a full-time staff cardiologist.

Several months after he was hired, circumstances at the hospital changed and, to assure adequate patient care, he was assigned to on-call duties in rotation with other physicians. These duties required him to treat all patients, not just cardiology patients. Although he was board certified in internal medicine, he nevertheless complained to his superiors, expressing concerns about what he considered his lack of competence to perform these duties.

The Medical Center later hired a new Chief of Staff (white male) from South Africa. The complainant immediately informed him of his concerns about on-call duties. The Chief of Staff responded by accusing the complainant of being unwilling to cooperate and ordering him to continue treating all patients. A second meeting on the same subject took place about a month later, during which both individuals became angry and raised their voices. The Chief of Staff reiterated that the complainant would have to do whatever he was told.

Several days later, the complainant claims he heard a rumor that he would

soon be reassigned to purely primary care duties. Shortly thereafter, he submitted his resignation. He later claimed that he was "constructively discharged" –*i.e.,* that he felt compelled to resign because of intolerable working conditions resulting from discrimination because of his color (Brown), race/national origin (India), and disability (polio).

To prove a claim of "constructive discharge", the EEOC requires a complainant to prove all of the following: (1) that a reasonable person in the complainant's position would have found working conditions intolerable, and (2) that discrimination created the intolerable working conditions, and (3) the resignation resulted from the intolerable working conditions.

The first element of proof requires evidence of an "intolerable situation" such as would force a reasonable person to resign. Ordinary or commonly experienced problems and disappointments in the workplace do not qualify as "intolerable" working conditions. Mere dissatisfaction with one's work situation is not the same as an intolerable working environment. Thus, routine employment matters such as low performance appraisals, changes in duty hours or work assignments, and failure to be promoted, do not, in themselves, create "intolerable" working conditions. Employees frequently experience such problems and disappointments, but do not usually resign because of them.

In this case, the physician failed to prove anything other than two unpleasant meetings with his new boss and dissatisfaction with his job duties. Although he claims he felt uncomfortable with those duties, the evidence showed that he had performed them without problems or negative results. Thus, his working conditions were not such that a reasonable person in his shoes would have felt compelled to resign. As there is no proof of intolerable conditions, the complainant's claim of constructive discharge fails, and the other two elements of proof need not be addressed.

Nevertheless, the complainant also failed to prove the second element, -*i.e*., that the matters complained of were due to discrimination. As for his claim of disability discrimination, he presented no evidence of a medical condition that substantially limited any of his major life activities; nor was there any evidence that management regarded him as disabled. He also failed to present any evidence to support his allegation that the matters in dispute were due to his race, color, or national origin.

As he failed to present proof of intolerable work conditions resulting from discrimination, he thus failed to prove the third element, -*i.e*., that his resignation was forced by intolerable work conditions caused by discrimination.

VIII

POWER OF FEDERAL AGENCIES TO SUBSTITUTE THEIR OWN DECISION IN PLACE OF AN ADMINISTRATIVE JUDGE'S RULING IS CURTAILED BY EEOC'S NEW FEDERAL SECTOR COMPLAINT REGULATIONS.

The civil rights laws enforced by the Equal Employment Opportunity Com-

mission (EEOC), which prohibit employment discrimination on the bases of race, color, religion, national origin, sex, age and disability, as well as retaliation, apply to employment discrimination by the federal government. While the substantive protections for federal employees are the same as those for all other workers, the procedures for resolving the complaints of federal employees differ markedly from the procedures that govern claims by employees in the private sector.

Because of widespread criticism of the federal sector complaint process, the Commission decided to revise its federal sector regulations. The revision that it recently approved will become effective November 9, 1999. It contains some significant changes in the way federal sector complaints will be processed.

What follows are questions and answers regarding some of the more important changes.

1. *Why did the Commission issue these regulations?*

The Commission states that it issued these regulations in an effort to improve the effectiveness of its operations. The federal sector program had come under criticism based on a number of factors:

• The process was too long and contained too many layers of review;

• Agencies could revise decisions of administrative judges regarding whether the agency had violated the law, leading to widespread perceptions of a process that was not impartial; and

• The process often led to the fragmentation of complaints, bogging down the system and making it difficult for federal employees to prove that they had been discriminated against.

2. *Who is affected by the changes?*

The federal sector complaint processing regulations apply to federal employees and applicants for employment in the federal government as well as to the agencies that employ and hire them.

3. *Has EEOC expanded the role of alternative dispute resolution (ADR) programs in the federal sector process?*

Consistent with its commitment to the use of ADR in its private sector programs, EEOC will require agencies to establish or make available an ADR program that will be available both during the pre-complaint process and the formal complaint process. Agencies will have substantial flexibility in how they structure their ADR programs so long as they incorporate principles of confidentiality, neutrality, voluntariness, and enforceability. ADR may function as an alternative to EEO counseling.

4. *Will agencies continue to be able to reverse or modify decisions issued by administrative judges?*

This is the most significant and controversial provision in the new regulation. Under the previous rule, EEOC's administrative judges (AJs) only issued recommended decisions regarding

whether an agency violated the law. Because they were only recommendations, federal agencies were free to reverse or modify them as they saw fit. While agencies won at most hearings, they reversed or modified AJ decisions in about two-thirds of the cases that they lost (although OEDCA's reversal rate was less than one-third). The new regulation provides that AJ decisions will continue to be submitted to the agencies for final action. However, the AJ rulings are now decisions, not just recommendations. Hence, agencies will no longer have the opportunity to rewrite the AJ decisions. Rather, they will only be allowed to issue an order indicating whether or not they will fully implement the AJ decision. If they choose not to fully implement the AJ decision, they must simultaneously file an appeal with the EEOC. Under this new regulation, OEDCA, as the statutorily designated decision-maker in the VA, will take final action and issue all orders on decisions issued by EEOC administrative judges.

5. *How much time will agencies have to issue final orders?*

Agencies will have 40 days to determine whether or not to fully implement the AJ decision and, if they choose not to fully implement the decision, another 20 days to file their brief on appeal. This corresponds to the 60-day period that agencies previously had to review an AJ decision and issue their final decision.

6. *Will an agency have to provide the complainant with the relief ordered by the administrative judge if the agency chooses not to implement the AJ decision and appeals?*

If the AJ decision involved restoration of the complaining party into a job, the agency must comply with the order pending the appeal. The agency may refuse to return the individual to his or her job if the agency determines that the individual's presence in the workplace would be unduly disruptive. If this occurs, however, the agency must provide pay and benefits until the appeal is completed. The agency is not required to pay any other monetary benefit ordered by the AJ pending the outcome of the appeal, but must pay interest on such sum if the complaining party ultimately prevails.

7. *What standard of review will EEOC apply on appeal*?

On appeal, the EEOC will review legal issues and factual findings by the agencies under a *de novo* standard while using the “substantial evidence” standard to review AJ findings of fact. This means that, on appeal, the Commission will not give deference to decisions made by agencies where there is no hearing, but rather, will conduct its own review of the facts "from scratch." However, the Commission, will give deference on appeal to decisions made by its AJs (as it has already been doing for the past few years). The Commission believes that it is appropriate to provide a deferential standard of review to factual findings made by AJ's who are independent decision makers and had the opportunity to directly evaluate the credibility of witnesses at the hearing. As a practical matter, these standards of review will make it extremely difficult for

agencies to succeed in their appeals if they fail to implement an AJ's decision finding discrimination.

8. *How do the changes address the problem of the fragmentation of cases?*

The Commission believes that a significant problem in the current system arises from the fragmentation of cases. Fragmentation -- breaking down cases into their constituent parts, thus causing the parts to be processed as separate complaints -- substantially adds to the number of cases and the overall burden in the system. It also makes it more difficult to prove some cases, especially harassment cases, which are dependent on a "critical mass" of facts. The new regulation includes a number of provisions to address this problem:

• Partial Dismissals: The regulations eliminate "interlocutory" (*i.e.*, immediate) appeals from partial dismissals for procedural reasons such as lack of timeliness, failure to state a claim, *etc*. Instead, the case will continue to be processed and appeals regarding the dismissed issues will be preserved until the rest of the case is ready for appeal.

• No More Remands: AJs will no longer be allowed to "clean up their docket" by remanding complaints or issues to agencies for counseling, supplemental investigation, or other processing. Once a case is before an AJ, the AJ is fully responsible for processing it, including dismissing issues for procedural reasons and supplementing the agency's investigation when necessary. These and many other new responsibilities placed on AJs will most certainly result in a significant increase in the length of time it will take an AJ to hold a hearing and then issue a decision. (Presumably, complainants will still be allowed to change their minds and withdraw hearing requests if they decide, for whatever reason, that they want an immediate decision from the agency.)

• Amending Complaints: Complaining parties will have greater rights to amend their complaints with "like and related claims." Moreover, independent claims brought by the same complaining party (*i.e.*, claims that are not "like or related" to those in the original complaint) will be consolidated for processing so that they will be handled together.

• "Spin-Off Complaints": The new rule adds a provision providing for the dismissal of spin-off complaints, which are complaints about the processing of existing complaints. It provides, instead, that complaints about existing complaints should be brought up and resolved as part of the original complaint. EEOC estimates that there are about 6,000 spin-off complaints filed each year.

9. *Are there changes to the class complaint process?*

Although there are certainly instances of class-wide discrimination in the federal government, under the prior rule only a tiny number of "class action" cases were brought within the administrative system. Most class cases were either diverted into the federal courts or they were simply not brought at all. According to the Commission, the new rule in-

cludes several reforms to the treatment of class actions that will make it more feasible for class claims to be brought and resolved in the administrative system.

• A class complainant may now move for class certification at any reasonable point in the process, usually no later than the conclusion of discovery. This recognizes that complaining parties do not have access to discovery until they are before an AJ and therefore may not have sufficient information when they file their individual complaint to determine whether or not class issues are raised.

• AJ decisions regarding class certification will be treated the same way as other AJ decisions. Agencies will take final action on certification by issuing a final order and, if they do not fully implement the AJ decision, by appealing to EEOC.

• AJs will review class settlements under the same "fair and reasonable" standard which federal judges use to review class settlements. This will ensure that settlements are fair to class members as well as their agents.

10. *Can agencies still dismiss complaints for failure to accept a certified offer of full relief?*

No. The regulation eliminates the provision that permitted agencies to dismiss complaints for failure to accept a certified offer of full relief. This provision had not been used very much after compensatory damages became available in the federal sector in 1991. The reason is that, short of conducting an investigation or holding a hearing, it is virtually impossible to determine when an offer of damages, which are often intangible in nature, constitutes an offer of full relief.

11. *Has EEOC provided another mechanism to encourage complainants to seriously consider settlement offers?*

Yes. To encourage settlement, the new regulation creates an "offer of resolution" procedure, based on the offer of judgment rule contained in the Federal Rules of Civil Procedure. Under this new procedure, agencies may make offers of resolution, which are basically settlement offers, to complaining parties. Failure to accept such offers could be costly for complainants. If they do not accept the offer and ultimately obtain no more relief than what was offered, no attorney's fees or costs will be payable for work done after the offer was not accepted.

12. *Can parties still request reconsideration of an EEOC appellate decision?*

Under the new rule, reconsideration of EEOC appellate decisions will no longer be available as a matter of right. Instead, EEOC will exercise its discretion in determining whether to reconsider its appellate decisions. As a practical matter, this change will have little impact, as EEOC usually denies reconsideration requests under the current regulations.

13. *Who will decide the amount of attorney's fees when the complainant requests a hearing?*

AJs will decide the amount of fees to be awarded to prevailing complaining parties. There will be a strong presumption that the traditional lodestar analysis (hours reasonably expended multiplied by a reasonable hourly rate) will determine the appropriate fee. Agencies will continue to decide the amount of fees when there is no request for a hearing.

14. *Will attorney's fees be available for work performed during the pre-complaint process?*

Fees will be available for legal work done before a complaint is filed in the limited circumstance where a complaining party prevails in a hearing, the agency chooses not to fully implement the AJ decision, and the EEOC finds in favor of the complaining party on appeal. The Commission believes that this will provide an incentive to agencies to assess carefully whether they will decline to fully implement an AJ decision that is adverse to them. To facilitate settlements, agencies and complaining parties may include attorney's fees for pre-complaint work in a settlement agreement. In all other situations, however, fees will only be available for post-complaint work.

15. *When will the changes become effective?*

The regulation will take effect on November 9, 1999. It will apply to all pending cases. Agencies will be required to have their ADR programs in effect by January 1, 2000.

16. *Will EEOC issue additional guidance to assist agencies and federal employees in complying with the new regulation?*

Yes. EEOC will issue significant revisions to its *Management Directive 110* to enable agencies and federal employees to better understand their rights and responsibilities under the new regulation.